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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971.

~~No. 99.~~

HOWARD S. SPERING,

Petitioner,

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

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THE OPINION BELOW.

The Opinion of the Court of Appeals for the Third Circuit (P 1a) is reported at 434 F. 2d 677.[1]

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

Should this Court review the narrow question of whether or not the Court of Appeals correctly decided that the District Court had not abused its discretion in dismissing this civil action for lack of prosecution under a valid local rule permitting dismissal for unjustified inaction of a year or more, where the petitioner, himself a lawyer and a member of the Bar of this Court, took no substantial action while the case languished in the District Court for four years, where absolutely no action was taken for over a year in the face of a warning of prejudice from lack of prosecution, where petitioner admittedly was aware of the consequences of such inaction, where no reasonable excuse was offered for the failure to prosecute, where two judges in the District Court fully considered all the facts and heard petitioner personally, where the claim itself was palpably lacking in merit and where the Court of Appeals considered the full record of the case in the light most favorable to petitioner and affirmed the dismissal and denied reargument?

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1. "P" refers to the Petition for Writ of Certiorari and the Appendix thereto.

COUNTERSTATEMENT OF THE CASE.

The Petition requests this Court to review a determination of the United States Court of Appeals for the Third Circuit affirming an order of the United States District Court for the District of Delaware dismissing petitioner's case under a Local Rule[2] permitting such dismissal for unjustified lack of activity for over a year and for failure to prosecute under Rule 41(b) F. R. C. P. Both Courts below reviewed the entire record of the case and all of the matters presented by the petitioner.

There is no dispute that the District Court had the power to dismiss the case under the Local Rule and under Rule 41(a) F. R. C. P. There is no dispute that such dismissal is within the sound discretion of the District Court. There is no dispute that the Court of Appeals correctly applied the appropriate scope of review in determining whether or not the District Court had abused its discretion.

Petitioner merely reargues the discretionary acts of two District Court Judges and the Court of Appeals. Respondent respectfully submits that this case is not one of importance for consideration by this Court and that the facts and the law clearly demonstrate that both the District Court and the Court of Appeals were correct in the decision rendered.

---

2. "RULE 12. DISMISSAL OF ACTIONS FOR FAILURE TO PROSECUTE.

Subject to the provisions of Rule 23, F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

In reality, petitioner's only argument is that this Court should seize this opportunity to overrule *Link v. Wabash R. Co.*, 370 U. S. 626, *reh. den.*, 371 U. S. 873 (1962), notwithstanding the fact that petitioner, a lawyer and a member of the Bar of this Court, was aware of, and shared the responsibility for the protracted inaction in the District Court and the consequences thereof.

A. Nature of the Case.

Howard S. Spering (hereinafter sometimes referred to as "petitioner", or "Spering") commenced this action against Texas Butadiene & Chemical Corporation, a dissolved Delaware corporation (hereinafter sometimes referred to as "respondent" or "TB&C") over six years ago on June 25, 1965, seeking legal fees of over $900,000 from his former client claimed to be due on the basis of an alleged oral agreement entered into in March, 1954. Respondent denies any liability for Spering's claim, asserts that he had admittedly been paid over $170,000 pursuant to specific written agreements and that the claim is barred by various affirmative defenses—statute of limitations, statute of frauds, estoppel, novation, vagueness, uncertainty and illegality. It has been plain from the outset that the action is totally without merit.

B. Course of Proceedings.

A brief outline of the chronology of the proceedings demonstrates the desultory attitude of petitioner and his attorney in the District Court.

June, 1965	Complaint filed.
August & December, 1965	Spering's deposition taken by defendant.

January, 1966	Amended answer filed and interrogatories propounded by TB&C.
October, 1966	Spering's answers to TB&C's interrogatories after Court overrules objections to interrogatories.
[First period of inactivity—fifteen months.]	
February, 1968	Spering's four token interrogatories filed.
May, 1968	TB&C files answers to Spering's four interrogatories.
[Second period of inactivity—fifteen months.]	
September, 1968	Clerk of the District Court requires report on status of case. TB&C warns that the case should be moved along or dismissed. Spering promises to proceed more expeditiously.[3]

3. The opinion of the Court of Appeals sets forth the relevant excerpts of the September 3, 1968 correspondence at pages 3a-4a:

"On August 2, 1968 Civil Action No. 3047, *Howard Spering v. Texas Butadiene & Chemical Corporation* was more than three years old. Accordingly, pursuant to Local Rule 3 of the District Court for the District of Delaware, plaintiff was asked on that day to file with the Clerk of the Court 'a statement in sufficient detail explaining why the case has not proceeded more expeditiously.'

"In a response dated September 3, 1968 counsel could 'only suggest that the plaintiff himself is an attorney actively engaged in the practice of law in Washington, D.C., the period of time during which the claim asserted by the plaintiff arose extends over a period of years, and great number of documents, memoranda and correspondence had to be reviewed from time to time as the case proceeded.' By way of conclusion, plaintiff's attorney stated: 'Plaintiff intends to proceed at this point more expeditiously in preparation for the trial of this case.' Defendant's letter to the Clerk of the Court stated defendant's position that 'it is incumbent upon plaintiff to move the case along promptly or dismiss it.' The District Court took no action at that time."

March, 1969	Spering writes to his lawyer stating his awareness that the case may already have been prejudiced by delay. (12a-13a)
August, 1969	TB&C moves to dismiss under Local Rule 12 for the failure to take action within one year and under Rule 41 (b) for lack of prosecution.
September, 1969	Motion to Dismiss considered and case dismissed by Judge Steel.
October, 1969	Chief Judge Wright heard reargument and additional material submitted by Spering and affirmed the dismissal.

The opinion of the Court of Appeals analyzes the history of the case in the District Court and we respectfully incorporate that analysis by reference (1a-9a).

C. Decision of the Court of Appeals.

The Court of Appeals regarded as highly significant the fact that Spering was a lawyer and his own awareness of the prejudicial lack of action and the fact that he did not cause the situation to be remedied. As stated in its opinion (5a):

> "Plaintiff Howard Spering, himself a lawyer, was not unaware of the dangerous drift that had set in for some time in the prosecution of his case. In a letter to his attorney dated March 26, 1969 Spering noted that 'months have gone by without our moving forward in our case against Texas Butadiene & Chemical Corporation.' 'I fear', he continued, 'that so much time has gone by without action on our part that we have prob-

ably already prejudiced our negotiative position in the case, if not also our position before the court.' "

The Court concluded (6a-7a):

"As our extensive recital of the history of the case has indicated plaintiff is himself a lawyer and as such not unaware of the importance of exercising rights timely. Just as the failure to comply with the statute of limitations might extinguish an otherwise valid right so are there perils from extended inaction in the conduct of a lawsuit. Indeed in plaintiff's letter to his attorney almost six months prior to the order of dismissal he expressed the 'fear that so much time has gone by without action on our part that we have probably already prejudiced . . . our position before the court.' "

"Appellant argues that 'this is not . . . (his attorney's) lawsuit, it is Mr. Spering's lawsuit;' and that 'any delay in the prosecution of the claim has not been Mr. Spering's responsibility, it has been Plaintiff's lawyer's responsibility.' The effect of the dismissal, appellant concludes, 'is to invoke a severe and harsh penalty upon plaintiff who himself has not been, if you will, guilty of any conduct that caused delay in the prosecution.' "

"To this contention the Supreme Court of the United States replied:

'. . . Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omission of this freely selected agent. . . .' Link v. Wabash Railroad Company, 370 U. S. 626, at 633-634, 82 S. Ct. 1386 at 1390.

"Where plaintiff is himself an attorney the Supreme Court's words are the more strongly applicable . . .".

The Court concluded, "Two judges of the District Court considered appellant's arguments and did not find in them the 'good reason for the inaction' required by Rule 12. We have passed over the same ground and more and are also satisfied that there has been no abuse of discretion. Reversal of the District Court's order of dismissal is unwarranted." (8a). Petitioner now simply urges this same worn-out argument on this Court.

D. Lack of Merit in Spering's Claim.

Spering's case is totally and palpably devoid of merit. Its mere presentation is a waste of judicial time and effort. Commencing in 1954, every bill Spering ever submitted was promptly and fully paid in a total amount of over $170,000, pursuant to specific written bilateral agreements. It was not until over ten years later that he claimed for the first time that he was entitled to additional compensation. The claim is supported by nothing other than Spering's *ipse dixit* assertion, and is clearly contradicted by contemporaneous documents Spering himself authored.

TB&C was formed in 1954 to construct butane dehydrogenation facilities with associated butadiene extraction facilities, an alkylation plant and blending facilities for the manufacture of aviation gasoline and butadiene for synthetic rubber. After nine years of operation the facilities were sold and the corporation was dissolved in 1963.[4]

When TB&C commenced its activities in 1954, Spering was a practising lawyer in Washington, D. C., using experience gained as a government official during the Government's synthetic rubber operating program during World

4. Factual references are documented in the brief filed by TB&C in the Court of Appeals. See, e.g., pp. 11-19.

War II and thereafter in the Petroleum Administration. TB&C engaged Spering to undertake negotiations for an alkylation facilities contract for the United States Government after having reached, in advance, written agreement as to the basis for his compensation. The scope of Spering's employment and the precise amount of his compensation were documented in detail in letters accepted by both Spering and TB&C.

The first letter agreement of March, 1954 established a per diem rate and a monthly retainer. This letter, authored by Spering himself, states in pertinent part as follows:

> ". . . You requested that I submit to you in a letter a basis upon which I would represent your interests here.
>
> "The usual per diem rate for such services is $125, and I should be pleased to work with you at this rate, with the understanding that a part of a day would be compensated ratably. On a project of this character, it is generally desirable to agree upon a minimum monthly retainer arrangement over the probable period during which the services would be required since I would be compelled to reserve time available for the work. On this basis, in the event that the time which is devoted to your interests exceeds the number of days compensated for by the minimum retainer at the above per diem rate, any additional time would be charged at $125 per day or ratably for part of the day. . . . a minimum retainer of $500 per month will probably be reasonable for such period of time as we may then agree upon . . ." (Appendix A)

This 1954 fee arrangement was superseded by subsequent letter agreements in 1956 and 1959 which raised

the per diem and retainer rates to Spering. It is undisputed that Spering submitted and TB&C promptly paid periodic statements in which Spering always referred to the then current letter agreement as the basis for the compensation. No other compensation arrangements were expressed or implied or even suggested at any time. When TB&C's business ended in 1962 Spering sent his final bill and wrote, "as far as I can tell this should clear up our accounts to date." (Appendix B).

In 1963 when the government instituted renegotiation proceedings TB&C again requested Spering to represent it and retained him before the Government Renegotiation Board in accordance with his usual billing practice, although at a higher rate. At the beginning of the renegotiation phase Spering's rate had increased to $250 per day. This was later increased to $400 per day, the increase being attributable to, in Spering's own words, ". . . the prevailing rates charged by other attorneys in this vicinity in the light of today's higher overhead and living costs." Spering submitted bills for his services at these increased per diem rates and TB&C promptly paid him accordingly. Again there is no document or any fact which indicates any agreement or any indication that there was any expectancy by Spering of additional compensation.[5]

Spering concluded all of his services for TB&C shortly after his July 31, 1964 billing. Instead of sending a final billing, he submitted a bill in November of 1964 in which he claimed for the first time that for his services from 1954 to date, he was entitled to one million dollars which he "voluntarily reduced" to $600,000 leaving a balance of $428,769.79 after crediting the $171,000 which had already been paid to him. However, it was not until he filed the complaint in the

5. There is no factual basis whatsoever for Spering's claim in this suit or his fictional and self-serving description of the "basic arrangement" which he asserts at page 5 and 6 of the Petition.

District Court, claiming over $900,000, that he alleged any oral agreement for any such additional compensation. The record in the District Court clearly shows that there is nothing to support such a claim.[6]

It is clear that there is no factual or legal basis for Spering's unsupported claim of a contingent fee. His lethargic lack of prosecution reflects this lack of merit and his basic lack of confidence in the case. This litigation met its appropriate demise when it was dismissed by the District Court and when that dismissal was affirmed by the Court of Appeals.

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6. TB&C has always admitted that there is some unbilled and unpaid time for which it has tendered payment to Spering. This claim is preserved by the opinion of the Court of Appeals. The precise amount of the admitted claim is not clear but it is not more than $9,500 for which TB&C has offered judgment to Spering in the District Court.

ARGUMENT.

I. No Question Is Presented Which Merits Review by This Court.

A. The Requirements for Certiorari Are Absent.

The Court will exercise its discretion and grant certiorari only where there are "special and important reasons therefor". For example, certiorari is inappropriate unless there is a conflict among the courts of appeals or where a federal question has been decided in "conflict with applicable decisions of this Court" or where there has been a significant departure from the "usual course of judicial proceedings" such as to require the supervision of the Court. Rule 19, Rules of the Supreme Court. None of these prerequisites is present here.

1. There Are No Special or Important Reasons and No Departure From the Usual Course of Judicial Proceedings.

The action of the District Court plainly fell within its discretionary power and was a result achieved only after careful consideration. Petitioner allowed his case to lay dormant in the District Court and took no action after warnings and his awareness of the prejudice from delay. Dismissal of this kind of case advances the administration of justice.

2. There Is No Conflict Among the Courts of Appeals nor Conflict With the Decisions of This Court.

Petitioner can point to no decision in other Courts of Appeals which conflicts with this decision. Furthermore, petitioner does not contend that this case conflicts with applicable decisions of this Court. He concedes that this case

is governed by the prevailing Supreme Court precedent on the subject, *Link v. Wabash R. Co., supra.* Indeed, he asks that this case be the occasion for this Court to overrule *Link,* even though the facts of this case present a far more egregious failure to prosecute than did the *Link* case.

B. This Case Does Not Present an Appropriate Occasion for Reconsideration of Link v. Wabash.

Petitioner attempts to create the erroneous impression that this Court's opinion in *Link v. Wabash* is a judicial aberration (P 15-27). To the contrary, even on its own facts *Link* is respected law.

It is important to keep in mind the factual differences between *Link* and the instant case. In *Link* an active case was dismissed because plaintiff's lawyer was unable to attend a pretrial conference due to other commitments. The plaintiff himself was completely blameless. Affirmance of that dismissal confirmed that the district courts have broad discretionary powers in the administration of justice. Here petitioner, himself a seasoned lawyer was aware of and a participant in, the delays and inaction. Dismissal of the action, appropriate in *Link,* was all the more appropriate here.

Spering relies on dissenting opinions of Mr. Justice Black in some cases where he expressed sympathy for a "harsh result". For example, in *Pittsburgh Towing Co. v. Mississippi Barge Line,* 385 U. S. 32 (1966) reh. den. 385 U. S. 995 (1966) and *Berman v. United States,* 378 U. S. 530 (1964) the litigant's case was lost because of tardiness of counsel in complying with deadlines under court rules. The same was true in *Lord v. Hellmandollar,* 378 F. 2d 780 (D. C. Cir. 1965), *cert. den.,* 383 U. S. 928 (1966) reh. den. 384 U. S. 928 (1966) and *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 352 F. 2d 460 (5th Cir. 1965), *cert. den.,* 384 U. S. 1004 (1966) and *Santana v. United States,*

385 U. S. 848 (1966) and *Morris v. Florida*, 393 U. S. 850 (1968). It is hard to imagine how these dissenting opinions can be of any comfort to Spering. His dilatory conduct in the District Court as the months dragged on and on bears no resemblance to the plight of litigants where cases were dismissed because of a lawyer's "near miss" on procedural deadlines.

Moreover, it is equally incorrect and irresponsible for Spering to assert in this Court that certain decisions of the Court of Appeals are not in accordance with the *Link* decision.[7] The facts compelling reversals in the cases upon which Spering relies[8] are so remarkably distinctive that they are quite consistent with *Link* and certainly of no help to Spering.

Petitioner's representation to this Court that *Link* is the subject of widespread judicial disapproval is incor-

7. Spering's petition ignores the wealth of authority upholding dismissals by the District Court under far more favorable to the plaintiff than those presented here. See, *e.g., Davis v. United Fruit Company*, 402 F. 2d 328 (2d Cir. 1968); *cert. den.* 393 U. S. 1085 (1969); *Hicks v. Berkins Moving and Storage Co.*, 115 F. 2d 406 (9th Cir. 1940); *Kenney v. California Tanker Company*, 381 F. 2d 775 (3d Cir. 1967); *cert. den.* 390 U. S. 904 (1968); *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956); *Nasser v. Isthmian Lines*, 331 F. 2d 124 (2d Cir. 1964); *Torino v. Texaco, Inc.*, 378 F. 2d 268 (3d Cir. 1967); *Esteva v. House of Seagram, Inc.*, 314 F. 2d 827 (7th Cir. 1963); *Grunewald v. Missouri Pacific Railroad Company*, 331 F. 2d 983 (8th Cir. 1964); *Fitzsimmons v. Gilpin*, 368 F. 2d 561 (9th Cir. 1966); *Schwarz v. United States*, 384 F. 2d 833 (2d Cir. 1967).

8. For example, in *Peterson v. Term Taxi, Inc.*, 429 F. 2d 888 (2d Cir. 1970) plaintiff lost his case because he could not be reached over a weekend to be notified of his trial on Monday and was a half-hour late. In *Flaksa v. Little River Marine Construction Co.*, 389 F. 2d 885 (5th Cir. 1968), *cert. den.*, 392 U. S. 928 (1968), the case was not a stale case (it was less than a year old and had promptly been filed), and the sympathy of the Court of Appeals for that lay plaintiff whose counsel had been grossly negligent was predicated on the fact that plaintiff had no knowledge or participation in the neglect, unlike the instant case where Spering is a lawyer and knew that the lack of activity by his local counsel was prejudicial

rect. The case stands as a correct decision even on its own striking facts. The principles established in *Link* apply *a fortiori* to the instant case. It is entirely inappropriate for him to suggest that this Court should grant certiorari, overrule the *Link* case, reverse the Court of Appeals and hold that it is an abuse of discretion to dismiss the case of a litigant who is a lawyer and a member of the Bar of this Court, who is aware of the consequences of delay and who nonetheless knowingly tolerates a series of delays in a four-year old case culminating in a final delay which exceeded the one-year period of a valid local rule.

II. The Determination by Both Courts Below Is Clearly Correct.

A. The Action of the District Court Was Well Within the Exercise of Its Discretion.

There is no dispute that a District Court has discretionary power to dismiss for lack of prosecution and there is no dispute that dismissal for inaction under a valid one-year rule is not, in and of itself, an abuse of discretion. The circumstances of each case must be examined to de-

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8 (cont'd)
to the case. In *Brown v. Thompson*, 430 F. 2d 1214 (5th Cir. 1970) the District Court committed a clear abuse of discretion in denying the plaintiff an involuntary nonsuit and instead dismissed his case with prejudice because plaintiff was temporarily prevented from obtaining documents in police files which were privileged while an official investigation was still in progress. In *Glo Co. v. Murchison & Co.*, 397 F. 2d 928 (3d Cir. 1968), cert. den., 393 U. S. 939, the very complex nature of the oil royalty agreements and the unclear nature of the admitted claim were quite different from the simplicity, and lack of merit of the instant case where Spering's claim for unbilled time requires only a calculation of time worked multiplied by a per diem rate. It is interesting to note that the *Glo Co.* case was dismissed a second time for failure to prosecute and there was no appeal. Equally inapposite is *L. P. Steuart, Inc. v. Matthews*, 329 F. 2d 234 (D. C. Cir. 1964), *cert. den.* 379 U. S. 824 (1964), which arose in an entirely different context and *Bibeau v. Northeast Airlines Inc.*, 429 F. 2d 212 (D. C. Cir. 1970), the facts of which are vastly different.

termine the proper scope and exercise of discretion. These circumstances were considered by two District Court judges based upon a full record and after Spering and his local counsel both had been given a full opportunity to be heard. The Court of Appeals considered all of the same matters "and more" and determined that the two District Court judges had not abused their discretion in dismissing the case.

B. The Circumstances Clearly Justify Dismissal.

The opinion of the Court of Appeals sets forth sufficient circumstances justifying the dismissal: (a) the one-year delay before dismissal was not explained; (b) the general lack of prosecution of the case was unexplained; (c) Spering's promise a year before the dismissal to proceed more expeditiously was not honored; (d) respondent's warning of dismissal for lack of prosecution a year before the dismissal was not heeded; (e) Spering himself is a seasoned lawyer; and (f) Spering himself was aware of the fact that there had been a delay and of the consequences of such delay in prejudicing a case.

C. Spering Cannot Avoid the Consequences of the Inaction of His Attorney.

In arguing for the granting of certiorari in this case and the overruling of the *Link* case, Spering depends entirely upon the alleged negligence and misrepresentation of his attorney. Assuming *arguendo* that his attorney was negligent and that he misrepresented the facts to Spering,[9]

9. There is no suggestion that TB&C or its attorneys were aware of or participated in any act of negligence or misrepresentation by Spering's former attorney—if any existed. We do not dignify with a reply the baseless innuendos appearing on pages 30-31 of the petition except to note that it would seem appropriate for the Court to strike at least this part of the petition or a least to disregard the same as scandalous pursuant to Rule 40(5) of the Rules of the Supreme Court.

it is clear under *Link* and other cases [10] that the blaming of one's attorney is not an excuse for failure to prosecute.

The *Link* holding that an attorney's neglect, especially in the circumstances shown by the record here, is not an excuse for lack of prosecution is obviously the correct rule. The judicial system can work only if litigants are responsible for acts of their attorneys voluntarily chosen. The rules so contemplate. See Rule 5, F. R. C. P. To rule otherwise would be to punish the other litigant and the judicial system itself. It is suggested by Spering that his attorney's alleged infidelity breached the agency relationship. Whether or not this may be true for certain purposes, *vis-a-vis* the attorney-client relationship, it is certainly not true with respect to third parties and has no application to any principle of law involving the administration of justice or the dismissal of cases for lack of prosecution.

Such an argument comes with exceeding ill grace in this case where the plaintiff himself is a lawyer and engaged in the active practice of law and has been a member of the Bar of this Court since 1947. Spering instituted this action ten years after allegedly making the agreement upon which it was based and after the respondent corporation had been dissolved. Surely it was incumbent upon petitioner to move the case forward with celerity. As the Court of Appeals recognized, plaintiff's status as a lawyer and his awareness of delays virtually compelled the result.

Finally, Spering cannot avoid the plain and admitted fact that he was aware that there had been a delay and that he was aware of the consequences of the delay. Yet, he did nothing properly to supervise his attorney or to obtain new counsel. Whatever remedies he may or may

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10. See, e.g., *Davis v. United Fruit Company, supra; Nasser v. Isthmian Lines, supra.*

not have against his counsel are irrelevant to the decision of whether or not this Court should grant certiorari.

D. A Reversal Here Would Create Chaos in the Administration of Justice.

Petitioner claims that the Court of Appeals set forth no standards and asks this Court to provide guidelines. The guidelines are quite clearly established already, and a reversal of the opinion of the Court of Appeals in the instant case would be counterproductive. Indeed, it would seem that district courts would be completely "at sea" in the administration of justice if they were powerless to control their dockets by dismissing cases such as the instant case. Rules like Local Rule 12 and Rule 41, F. R. C. P. would become meaningless.

As the Court stated in *Link*, the reason for vesting the district courts with this discretion is to ". . . prevent undue delays in the disposition of pending cases and to avoid congestion on the calendars of the District courts, [and] . . . to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief . . . [this] 'inherent power' [is] governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U. S. at 629-31.

Indeed, the standard of *Link* is a clear standard—that the District Courts in enforcing rules such as Local Rule 12 and in supervising the conduct of cases by litigants and their lawyers are vested with a very wide discretion and only compelling circumstances clearly demonstrating an abuse of that discretion will be sufficient to constitute a reversal.

CONCLUSION.

The Petition for Certiorari should be denied.

Respectfully submitted,

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Dated: August 19, 1971.

APPENDIX A.

HOWARD S. SPERING
1518 K Street, Northwest
Washington 5, D. C.
NAtional 8-3482-3

March 26, 1954

Mr. Robert L. Purvin
Fidelity Union Life Building
Dallas, Texas

Dear Mr. Purvin:

On March 22, 1954 in my office you discussed with me the project which your firm is developing for the construction and operation of a butane dehydrogenation facilities with an associated alkylation plant and butadiene extraction facilities. As I told you, the proposed project interests me greatly and I should be very pleased to collaborate with you. You requested that I submit to you in a letter a basis upon which I would represent your interests here.

The usual per diem rate for such services is $125, and I should be pleased to work with you at this rate, with the understanding that a part of a day would be compensated ratably. On a project of this character, it is generally desirable to agree upon a minimum monthly retainer arrangement over the probable period during which the services would be required since I would be compelled to reserve time available for the work. On this basis, in the event that the time which is devoted to your interests exceeds the number of days compensated for by the minimum retainer at the above per diem rate, any additional time would be charged at $125 per day or ratably for part of the day. Expenses, if any, incurred specifically in your interest would be item-

ized and billed additionally. I would, therefore, suggest that when you are ready with the necessary information for us to put together a picture to present to the Government, a minimum retainer of $500 per month will probably be reasonable for such period of time as we may then agree upon.

Recognizing that prior to such time you may have occasion to call upon me for preliminary advice or counsel, the time devoted in such preliminary phases could be charged at the above mentioned per diem rate with any incidental expenses accounted for and billed separately. I believe that the type of preliminary and ultimate arrangement suggested would be best suited to the requirements of your project as I understand it at the present time.

I shall look forward to your further advice in the matter, and enjoy working with you. I will send you a separate letter indicating my views as to the possibility of obtaining an Alkylation Contract from Government and the type of data and information that would be required.

Very truly yours,

HOWARD S. SPERING
Howard S. Spering

HSS:lp

APPENDIX B.

SPERING, MORTON & DUTTON
ATTORNEYS AT LAW
1518 K Street, Northwest
Washington 5, D. C.

NAtional 8-3482

HOWARD S. SPERING
DAVIS W. MORTON, JR.
HOWARD B. DUTTON

PETROLEUM
PETROCHEMICALS
ADMINISTRATIVE
MATTERS
FEDERAL TAXES

August 16, 1962

Mr. John R. Kerby, Jr., Treasurer
Texas Butadiene & Chemical Corporation
529 Fifth Avenue
New York 17, N. Y.

Dear John:

After sending you our statement for retainer and expenses through July 31, 1962, it has just now come to my attention that we had failed to invoice you for reimbursement of our cost of purchase of copies of the transcript of the hearing we had before the Oil Import Appeals Board. Consequently I am enclosing in duplicate my statement for reimbursement of this item expense advanced.

As far as I can tell, this should clear up our accounts to date.

Best wishes.

Sincerely,

HOWARD

HOWARD S. SPERING

HSS:lmh
Enclosure